LECTURE

AMERICAN CORRESPONDENCE SCHOOL OF LAW

NEGOTIABLE INSTRUMENTS

BY

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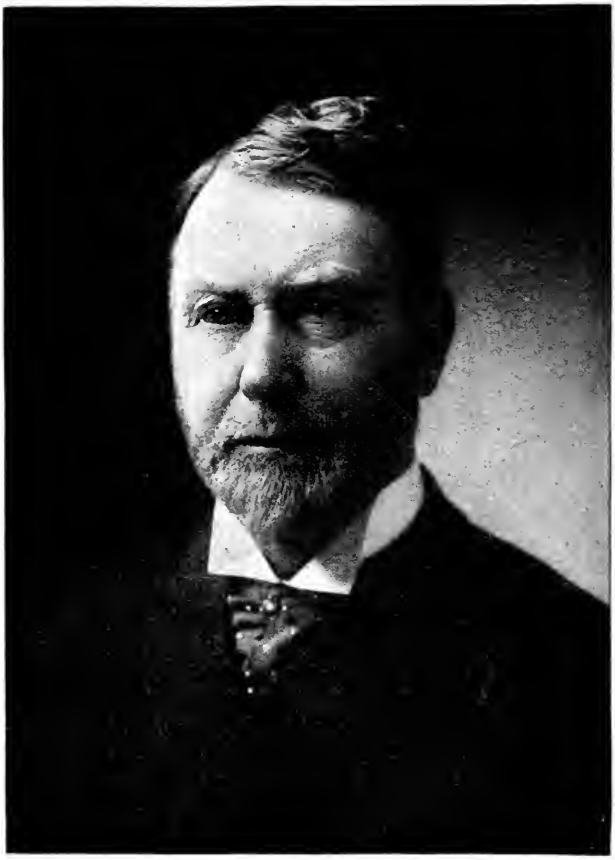

R. M. Bashford

Biographical Sketch

of

HON. R. M. BASHFORD.

Mr. R. M. Bashford has practiced law for nearly thirty years in the City of Madison, and for more than fifteen years was connected with the College of Law of the University of Wisconsin. As a member of the law faculty Mr. Bashford treated at different times the following subjects: Federal Procedure, Fraudulent Conveyances, Private Corporations, Insurance, Equity Pleading, Code Pleading and Statutory Rights and Remedies.

In his practice at the bar Mr. Bashford has been connected with important litigation of a public as well as private character, and has been unusually successful. He was special counsel for the State in the actions brought in 1891 to recover from the former state treasurers of Wisconsin interest moneys received by them upon the deposits of the public funds in the banks, in which judgments to the amount of over half a million dollars were secured. Mr. Bashford was counsel for the Secretary of State in the suit brought in the Supreme Court of Wisconsin in 1904 to test the regularity of the two Republican state conventions held that year, each of which nominated a state ticket and elected delegates to the national convention. The litigation resulted in sustaining the validity of the ticket headed by Governor LaFollette, although the National Republican convention seated the delegates chosen by the rival convention. Mr. Bashford was special counsel in the suit brought in 1906 to test the validity of the inheritance tax law of the state, and which was upheld by the Supreme Court of Wisconsin.

Mr. Bashford has taken an interest in public affairs, and served as City Attorney and Mayor of Madison, State Senator from Dane County and member of the Supreme Court by appointment of the governor. He is now engaged in active practice, devoting his entire time to professional business, and is associated with Mr. Rex Welton under the firm name of Bashford & Welton, at Madison, Wisconsin.

NEGOTIABLE INSTRUMENTS.

By R. M. Bashford.

This lecture is written for the American Correspondence School of Law to be read in connection with Vol. VI of Chadman's Cyclopedia of Law, treating of Negotiable Instruments and Principal and Surety. It is limited as to the number of words, and no attempt is made to treat the different subjects considered in an exhaustive manner. Legal principles are stated concisely and, it is believed, comprehensively and accurately. The definitions and rules are elementary and are derived largely from the excellent work on Negotiable Instruments by Mr. Daniel, which should have a place in the library of every practicing lawyer. An extensive citation of authorities is not deemed necessary, as they may readily be found by consulting the treatise mentioned or by reference to any standard digest.

Commercial paper had its origin in the usage of trade where, instead of cash payment, a writing was given evidencing the consideration, which it might be desirable to transfer to another person at a different place, or later at the same place. This usage of merchants with other customs essential to commercial transactions, grew into a body of laws known as the Law Merchant or Mercantile Law. The Law Merchant is founded on custom, and is the offspring of usage and convenience. It has grown with the extension of commerce and has been enlarged and its boundaries defined by statutory enactments and by judicial construction. At the outset it was administered by separate tribunals, but for the last two

hundred years has been under the jurisdiction of Common Law courts. For definition and sources of the Common Law see Chapter II, Vol. I, of the Cyclopedia.

Negotiable paper includes all choses in action which were recognized as possessing the quality of transferability. A "chose in action" is the right to recover a thing as distinguished from the thing itself, including contracts and promises which confer on one party the right to recover a personal chattel or a sum of money from another by action. Under the old rule of the common law a chose in action was not the subject of transfer so that the assignee thereof could sue in his own name; but a suit might be brought in equity in the name of the assignor for the benefit of the assignee, subject, however, to all rights existing between the original parties. The inconvenience, uncertainty and delay of such a procedure led to the recognition among merchants of a custom to treat certain choses in action in the form of a written direction or promise to pay a certain sum of money to another as transferable, and enforceable by the holder in his own name and in his own right, and this custom became part of the Law Merchant, and as such was later recognized and enforced in the common law courts.

Commercial paper includes all choses in action which, under the existing common law, possess the quality of transferability and embraces all evidences of indebtedness which are commonly used in the transaction of business as the representatives of money for the purpose of transferring credits. As here defined, it includes negotiable and non-negotiable instruments. De Hass v. Dibert, 70 Fed. 227, 17 C. C. A. 79, 30 L. R. A. 189.

Negotiable instruments include all written orders or promises for the payment of a certain sum of money by

one person to the order of another, or to bearer, and which are transferable, if payable to order by indorsement, if payable to bearer, by a mere delivery of the paper. Negotiable paper when so transferred before maturity, in good faith in the usual course of business and for a valuable consideration, carries the right to recover the full amount as against the makers and indorsers, if any, without regard to claims on their behalf of failure or want of consideration or of payment or offsets, as in such case inquiry is not permitted as to the original consideration or other defenses between the prior parties, or as to the title, although the instrument, after execution, may have been stolen and put into circulation. It is this quality of negotiability that gives commercial paper its superior character and enables it to pass as the representative of money in business transactions. The words essential to negotiability are, "or order," "or bearer," or words of like significance.

A non-negotiable instrument does not contain the words, "or order," "or bearer" in connection with the person to whom payment is to be made, or if so, the time of payment may have passed; nevertheless the purchaser acquires the right of his transferee but holds subject to all defenses existing between the prior parties. The transferability of the paper and the presumption of consideration distinguish it from other choses in action which were not assignable at common law and where no consideration was presumed.

Negotiable paper embraces bills of exchange, promissory notes, checks, certificates of deposit and orders drawn by any person or corporation directing the payment to another or to order or to bearer of a certain sum of money. Warehouse receipts and similar paper is made negotiable by statute in many states. These

instruments all partake of the characteristics of bills or notes and they will be treated as belonging to one or the other of those classes. The earliest form of negotiable paper was the bill of exchange which was originally employed solely by merchants for the purpose of foreign trade, and to avoid the sending of money from one country to another involving the risk and cost of transportation and possibly the expense of recoinage. Its use soon became general by all classes of persons, in domestic as well as foreign transactions, and it then became an important instrument for the transfer of credits at home as well as abroad.

A bill of exchange is an unconditional order by the person signing it on another, directing him to pay to a third person or to his order or to bearer, the sum of money therein named, at the time indicated.

The person who draws the bill is called the *drawer,* the person on whom it is drawn, the *drawee,* and the person in whose favor it is drawn, the *payee.* When the *drawee* accepts the bill and not before, he becomes liable for its payment, and may then be called the *acceptor.* An acceptance is customarily made by writing the word "accepted" upon the face of the bill and signing thereunder the name, but there is no particular place and no uniform formula observed.

Bills of exchange are divided into two classes, *foreign and inland.* A foreign bill is drawn in one state or country and made payable in another; an inland bill is drawn and made payable in the same state or country. The place of payment, and not the residence of the parties, determines the character of the bill; thus a bill drawn by A in Chicago addressed to B and payable to C in New York, all the parties being residents of Illinois, is a foreign bill of exchange. The chief distinc-

tion between foreign and inland bills is that a foreign bill is governed by the law of the place where it is payable while an inland bill is controlled by the law of the place where drawn, that being the place also where it is made payable. Furthermore, it is necessary to protest foreign bills for non-acceptance or for non-payment in order to hold the drawer and indorsers, but it is not generally necessary to protest inland bills.

One copy only is usually made of inland bills, but it is the general custom to issue several copies of a foreign bill payable in a foreign country, three and sometimes four, in order to avoid the inconvenience and delay that might be occasioned by the loss of a single copy. These copies become a set of exchange, and constitute one bill. They may all be negotiated but when one of the parts is accepted and paid all the others are extinguished. If the bill is issued in sets, the recital upon its face indicates the fact and number thereof. The drawee should accept but one of the parts and upon payment should demand its surrender. It is the duty of a purchaser of a foreign bill to inquire after the other parts which are missing, and he cannot therefore be an innocent holder where one of the parts has already been negotiated.

When one person draws a bill upon another in favor of a third person, it is implied that the drawee has funds belonging to the drawer or that he is indebted to him to an amount sufficient to meet the sum of money ordered to be paid. This, however, is not essential to the validity of the bill. When the drawee accepts unconditionally, his obligation to pay the holder is absolute and not at all dependent upon his indebtedness or his possession of funds belonging to the drawer.

A promissory note is an unconditional promise by one person to pay to another, or to his order, or to bearer,

a certain sum of money at a specified time. The person who signs the note is called the maker, and the person to whom it is payable, the payee. To be negotiable, the note must be payable to order or to bearer.

Paper payable to order is transferable by indorsement; if payable to bearer, by delivery merely. The endorsement is the writing of the name of the payee on the back of the paper, who thereby becomes the indorser. The indorsement may direct the payment of the paper to another or to his order, or to bearer, or it may be in blank, that is without the name of the payee or indorsee. The indorsement is an independent contract and in order to be negotiable must be in blank or it must direct payment to the order of another, or to bearer.

The bill or note may be in any form of words provided it be an unconditional order or promise for the payment of money at the time specified. If a negotiable instrument be so drawn that it is uncertain whether it is intended to be a bill or note, the holder may treat it as one or the other as he prefers. An order or promise to pay out of a particular fund is not negotiable as it does not direct payment at all events; but an absolute order to pay coupled with a direction to the drawee to reimburse himself out of a particular fund is a negotiable instrument.

The *date* is usually inserted in a bill or note, but this is not essential to negotiability. If the instrument is payable at a certain time after date, at sight, or on demand, it should be dated, but evidence is admissible to show on what day such paper, if not dated, was issued, or if that cannot be shown, when it was last negotiated, and it takes effect from such delivery. When an undated instrument is issued and delivered to the payee, the presumption of law is that he is authorized to insert

the date, and the maker will be bound thereby, at least to an innocent holder for value. A bill or note is frequently ante-dated or post-dated for the purpose of accelerating or postponing payment, and negotiated prior or subsequent to the day of its date. In such case if it becomes material to protect the rights of the holder, evidence is admissible to show when the paper was in fact issued, and it takes effect from that time. The paper is presumed to have been issued on the day it bears date.

There are certain requisites relating to the execution of the instrument, essential to negotiability, which must be strictly observed, and which will here be briefly considered. There must be certainty as to all the component parts of the paper to make it negotiable.

First. The order or promise must be "open" that is unsealed. A seal usually destroys the negotiability of paper, but an exception is recognized with respect to paper issued by business corporations, when it is apparent upon its face that the paper was issued for the purpose of negotiation. This exception extends to coupon bonds whether issued by a corporation or an individual. 2 Daniel on Negotiable Instruments, Sec. 1487.

Second. The name of the drawer of the bill or the maker of the note must appear upon the face of the paper in such form as to leave no uncertainty as to the person issuing the same, or bound for its payment. The name is usually written in ink at the lower right-hand corner, but the place is not material if it is clear from the face of the paper that it was intended to be issued as a negotiable instrument by the person whose signature is thereto affixed. The instrument may be executed by more than one person, and the same certainty is required as to the obligation thus assumed. If the signa-

tures should be in the alternative, "A. B." or else "C. D." the paper would not be negotiable unless it appeared upon its face that the liability of one was absolute and the other conditional, when the conditional liability might be treated as surplusage and the absolute liability enforced. If the paper is signed by more than one person, it is either joint or several according to the words employed. If the word "we" is used in the body of the instrument, or the word "jointly," it is a joint obligation, while if the word "I" is so employed, or the words "jointly and severally," it is a several obligation. If the obligation is joint, but one action can be maintained upon it which should be against all; if it be joint and several, the action may be brought against all or against each one separately to enforce payment.

Third. The drawee must be designated in the bill with reasonable certainty. His name is usually written on the face of the paper at the lower left hand corner, but the place of the address is not material provided it clearly appears who was intended, especially when the bill has been accepted by such drawee. The bill may be addressed to two or more drawees, and each must accept individually in order to be bound, unless they are partners when an acceptance by one is sufficient. It is not essential to the negotiability of the bill, when addressed to two or more, that all should accept, as it may be negotiated with the acceptance of one or more at the option of the holder. A bill may designate one or one or more persons in addition to the drawee to whom resort may be had in the event of its being dishonored by the drawee, and this does not impair its negotiability.

Fourth. The instrument to be negotiable must designate with certainty the payee, the party who is to receive payment. The person need not be named if it suffi-

ciently appears that the holder at maturity is entitled to recover the amount. The paper may be made payable to bearer, or to holder, or to a guardian of an infant, or to the trustee of an estate, or to the cashier of a bank, or other officer of a corporation. A mistake or ambiguity in naming the payee will not destroy the negotiability of an instrument if it can be shown by extrinsic evidence who was intended. Commercial paper payable to a particular person without words of negotiability, is valid between the parties and is subject to assignment, but is not negotiable. The instrument may be payable to two or more joint payees and their interests are presumed to be co-equal and it may be negotiated by the indorsement of all of them. If such paper is payable to two or more persons in the alternative, it is not negotiable but it may be enforced between the parties. If the payee named in the paper be a fictitious person and it be negotiated by the maker, it may be enforced against him and the indorsers having knowledge of the fact, as if payable to bearer. A bill or note may be made payable to the order of the drawer or maker, and when negotiated by indorsement may be enforced, as there are then two parties to the transaction. A bill of exchange may be drawn by the drawer upon himself payable to his own order and the drawer, the drawee and payee will then be the same person, and when transferred by indorsement it is a valid negotiable instrument. In such case the holder may treat the paper as either a bill of exchange or a promissory note, as the drawer is bound without notice of dishonor, as he thereby guarantees that he will honor the bill.

Fifth. The obligation to pay must be certain. The bill must therefore contain a distinct order and the note a distinct promise to pay the sum of money therein

stated. No particular form of words need be employed, provided they clearly convey the purpose of the drawer or maker with respect to the payment. The obligation to pay must be absolute and unconditional or the instrument will not be negotiable.

Sixth. The amount to be paid must be certain, and should be stated in the body of the instrument, although a note has been held negotiable where the amount could be ascertained with exactness from other parts of the paper. Smith v. Clopton, 4 Texas 109. A bill or note payable with exchange is negotiable as current exchange is commonly known in commercial circles, and may be readily ascertained by any holder of the paper on the day of payment. A stipulation to pay attorney fees or costs of collection contained in a note, may not destroy its negotiability, although decisions upon the subject are not uniform. Morgan v. Edwards, 53 Wis. 599; Peterson v. Bank, 78 Wis. 113. An agreement subjoined to a note, stating that it is given for personal property, the title to which is to remain in the payee until payment, does not render the note non-negotiable. Kimball Co. v. Mellen, 80 Wis. 133. It is also essential to negotiability that the instrument should be payable in money or its equivalent. Money is a generic and comprehensive term and includes whatever is lawfully and actually current in buying and selling, as of the value and as the equivalent of coin. Klauber v. Biggerstaff, 47 Wis. 551. A bill or note, therefore, payable in currency or in bank notes would now be considered as negotiable, but would not be, if it called for payment in goods or other personal property. It is not essential that the paper be payable in the money of the place of execution or payment, provided the particular denomination of the foreign money is stated in the instrument so that its equivalent value can be ascertained.

Seventh. The time of payment must be specified or indicated with reasonable certainty in the paper in order to be negotiable. Indefiniteness or remotness of the day of payment does not impair the negotiability of the instrument, provided that the time therein stated must arrive sooner or later, or may be accelerated at the option of the holder. An instrument is therefore negotiable that is payable on or before a certain date, or if payable in installments, with the stipulation that upon failure to pay any one of the installments the entire amount shall thereupon become payable. Thorpe v. Mindeman, 123 Wis. 149, 159. A note payable upon the maker's death is negotiable, as the event is certain, but if payable when he reaches a certain age, it is not, as the day may never arrive. A statement in the paper explaining the consideration for which it is given will not destroy its negotiability, if it does not render the payment conditional, nor will a reference to collateral securities have such effect. Thorpe v. Mindeman, 123 Wis. 149. A note payable "when convenient," or "as soon as I can," or "when I am able," has been held negotiable by courts, which construe the language to mean within a reasonable time and then determine such time, but the weight of authority seems to be to the contrary. Tiedeman on Commercial Paper, Section 25b. A note is negotiable which authorizes the confession of judgment for the amount due if not paid at maturity; but a stipulation therein authorizing the entry of judgment at any time after date, whether due or not, and the immediate issue of execution would render the note non-negotiable. Wis. Y. Meeting v. Babler, 115 Wis. 289. An instrument payable out of a particular fund is not negotiable, as its payment becomes conditional upon the existence and adequacy of such fund at maturity; but the indication

of a fund from which reimbursement may be made is not objectionable if it does not render payment conditional thereon.

The place of payment need not be, though it frequently is, stated in the bill or note. If no place is mentioned, then the paper is payable at the place of business or, if he has none, at the residence of the payor. If the bill is addressed to the drawee at one place or another in the alternative, the place of payment is presumed to be where he accepts the bill. If the place of payment is designated by the drawer he will be discharged unless it is there presented, as well as the indorsers. If the paper is made payable at a particular place and not elsewhere, it must be presented for payment at that place or all parties will be discharged except the acceptor of the bill or the maker of the note, who would not be released except to the extent of the interest that might accrue after maturity and prior to the making of personal demand of payment. It is customary to insert in commercial paper the words "value received" or others of like import as acknowledgment of the consideration by the payee, but such words are not necessary to the negotiabiity of the paper. If the elements above mentioned as essential to negotiability are contained in the paper, a sufficient consideration is presumed.

Delivery is essential to the validity of any written contract, and as long as negotiable paper remains in the hands of the maker it is a nullity. Delivery may be made personally, or by mail or express, or as an escrow, that is to a third person to be held by him until the happening of a certain event when the title is to pass to the person indicated. If the event never occurs and the custodian wrongfully turns over the instrument to the payee, it is void even in the hands of an innocent

holder. Chipman v. Tucker, 38 Wis. 43. It is common in commercial circles for a note or bill to be executed in blank and delivered to another to fill up and transfer for the benefit of the maker, or for his own benefit, and paper so issued carries on its face an implied authority to perfect and negotiate the instrument; and the person to whom the paper is entrusted must be deemed the agent of the maker, who is bound by his acts after transfer to an innocent holder. Bank v. Neal, 63 U. S. 96.

The law merchant and the common law coincide as to the essentials of a contract; there must be competent parties, a union of minds and a sufficient consideration. The capacity of a party to incur liability on commercial paper is co-extensive with his power to transact business and incur trade obligations, and he may act through the agency of another being equally bound thereby as though the act were performed by himself. There is this distinction, however, to be observed with respect to the power of an agent to execute commercial paper: the authority to execute or to indorse bills and notes will not be implied from express authority to an agent to transact some other business, unless it is absolutely necessary to the exercise of the power actually conferred upon him by the principal, or unless the agent holds a position presumably conferring such power, as the cashier of a bank. In the execution of a note or bill, the agent should sign the name of the principal and then add his own name as agent. If the agent affixes only his own name he will be personally liable, and in a suit against him on the instrument, he cannot show by parol evidence that he intended to act for his principal and not for himself. Where paper is signed by an agent without designating the name of the principal, the holder may show by parol who

the principal is and enforce payment of the paper against him. Conroe v. Case, 79 Wis. 338.

The union of minds of the parties is evidenced by delivery of the paper, which has already been considered.

Commercial paper must be founded on a valuable consideration, but such consideration is presumed when the instrument is negotiable and also when non-negotiable, if it contains an acknowledgment thereof upon its face. The want or failure of consideration is always a defence in an action between the original parties and those sustaining the same relation to each other, such as the indorser and his immediate indorsee; but when negotiable paper has been properly transferred for value to an innocent holder, the consideration, if lawful, is not subject to inquiry or attack. When the instrument has been negotiated to a third party there are two considerations involved, that which the maker received when the paper was issued and that which the holder paid when he purchased it, and in an action by such remote party against the maker both considerations must fail to defeat a recovery. Hoffman v. Bank, 79 U. S., p. 190. The true relation of the parties, if it does not appear on the face of the instrument, or by its indorsement, may be shown by parol evidence and thus open up the question of consideration if the parties stand toward each other in the same right as maker and payee or as indorser and immediate indorsee. Peterson v. Johnson, 22 Wis. 21. The same consideration will support the obligation of all who unite in executing the paper, whether as joint makers, sureties or guarantors, and the presumption is that the signatures were affixed before the delivery of the instrument. The signing of the paper by a third party after its delivery without a new consideration creates no liability against him as the orig-

inal consideration will not support his undertaking, unless made in pursuance of a previous promise to the payee as an inducement to the acceptance of the paper.

Accommodation paper is the loan of credit and, as there is no valuable consideration moving to the maker thereof, it has no validity until negotiated, when it is enforceable by a holder for value, although with knowledge of its character.

There are two kinds of consideration, good and valuable. Natural love and affection constitute a good consideration, sufficient to uphold an executed contract. Anything of pecuniary worth constitutes a valuable consideration which is essential to support commercial paper. A moral obligation is a sufficient consideration for negotiable paper when it is founded upon an antecedent legal obligation voidable at the election of the promisor, such as a debt barred by the statute of limitations. Valuable considerations include money as the most common, the transfer of property, service rendered or to be rendered, an existing debt, delay or forbearance in the enforcement of an existing obligation, indemnity for a liability assumed by the payee for the maker, or the compromise of a claim asserted in good faith in a transaction which is not illegal. Brooks v. Wage, 85 Wis. 12.

Where the consideration is voidable as against public policy, or made so by statute the contract cannot be enforced as between the original parties; but an innocent holder for value of negotiable paper founded upon such consideration may recover thereon. If, however, the statute prohibits the transaction under a penalty, or declares that a contract founded upon consideration therefor to be absolutely void, a negotiable instrument issued in fulfillment thereof is invalid even in the hands of an

innocent holder for value. Where a part of the consideration is so illegal, it taints the entire instrument and there can be no recovery thereon. Barnard v. Backhaus, 52 Wis. 593.

A bill of exchange is not complete until it has been accepted, although it is subject to negotiation as soon as delivered to the payee. The drawee is not liable before he has accepted the bill, although he is in possession of funds of the drawer sufficient to pay the amount. An acceptance is an engagement on the part of the drawee to pay the bill according to the terms of acceptance, and a general acceptance is an engagement to pay according to the tenor of the bill. The act of accepting a bill is like the making of a note; it is the execution of a contract by which the acceptor undertakes to pay the amount specified to the payee or holder thereof when the same becomes due; the acceptor is supposed to pay the bill out of funds belonging to the drawer, but his liability becomes absolute and primary for the amount thereof when the acceptance is made.

It is the duty of the holder of a bill to present it to the drawee seasonably for acceptance and if he fails to do so he will discharge the indorsers, if any, and the drawer as well. If acceptance is refused the bill is dishonored and should be protested if a foreign bill; and in all cases of refusal to accept notice should be given immediately to all persons whose names appear thereon as drawers or indorsers, and suit may then be brought against them for the amount even though the paper has not matured. A bill payable on demand or at a fixed date in the future, unless there is a direction to that effect or the bill is sent to an agent for collection, need not be presented before maturity, when it should be presented for acceptance and payment, although it is cus-

tomary to present such paper for acceptance within a reasonable time after negotiation in order to ascertain whether it will be honored. If in either case acceptance is refused, there should be protest and notice for non-acceptance according to the rule above stated. When the bill is payable at sight or after any uncertain event and when presentment is necessary to fix the date of maturity, it should be presented for acceptance within a reasonable time, and if refused protest made and notice given as already indicated to hold the drawer and indorsers. Presentment should be made by the holder of the bill or his authorized agent, who should have the paper in his actual or potential possession and, if a protest is anticipated, a notary public should be employed to make presentment. Presentment should be made at a seasonable hour to the drawee or his authorized agent at his place of business, if any, or at his residence. If the drawee cannot be found, the bill may be treated as dishonored and protested for non-acceptance, if protest is necessary, and notice given to the drawer and indorsers. The drawee is entitled to a reasonable time, usually twenty-four hours, to examine his accounts and ascertain the correctness of the bill before determining whether or not he will accept, and if he gives no answer at the expiration of the time the paper should be treated as dishonored. If the bill is in two or more parts, the drawee should accept but one; otherwise he may make himself liable to an innocent holder for the payment of more than one of the set. Acceptance may be dispensed with or waived by the drawer, and it is presumed to be when the drawer and drawee are the same person or members of the same firm or officers of the same corporation. An acceptance is usually made by writing the word "accepted" across the face of a bill and adding

the signature of the drawee, and the holder may refuse to take any other, although any other writing on the bill or upon a separate paper signifying an intention on the part of the drawee to accept might be sufficient to charge him with liability.

Acceptance may be implied by the acts of the drawee, as where the bill is drawn for his own accommodation, or if he having it in his possession procures another to discount it, or by detention of the bill under some circumstances where it has been presented to him for action. An agreement to accept will be valid if made in writing within a reasonable time before or after issue, if the bill is taken by the holder relying upon the promise. The holder of the bill is entitled to an absolute general acceptance and he may refuse to take any other. If he takes a qualified or conditional acceptance he must at once obtain the consent of the drawer or indorsers or they may be released. A qualified acceptance varies the effect of the bill as drawn and may be conditional as to amount, the time or place of payment or upon the possession of funds of the drawer at maturity of the bill. A qualified acceptance is binding upon the acceptor and all subsequent parties and also upon all prior parties who have assented, but all prior parties who have not assented are discharged, except the drawer who is not released when the condition relates solely to the possession of funds by the drawee which he impliedly guarantees. The circumstances under which a bill may be accepted by a stranger supra protest are stated in the Negotiable Instruments Law and need not be considered here.

By a general acceptance the drawee admits that the signatures to the bill are genuine, that he has in his possession funds of the drawer for its payment, that

the drawer has the capacity and the authority to draw the bill whether drawn by an agent, a partner or an administrator, and also the capacity of the payee to indorse when the bill is payable to his order. Such acceptance, however, does not admit the genuineness of the payee's signature where the bill has been indorsed by him or the genuineness of the agent's signature or his authority to indorse for the payee; nor does it admit the genuineness of the body of the bill; and if the terms of the bill have been so altered as to release the drawer, to whom he has a right to look for reimbursement, he is discharged.

The great importance and peculiar value of negotiable paper in commercial transactions is due to the fact that it is subject to transfer free from any claims or defenses that may exist between the original parties. The transfer is made by delivery or by indorsement. If payable to bearer, the delivery of a negotiable instrument by one holder to another passes the complete legal title; and the same is true where the paper is payable to order and has been indorsed in blank. A negotiable instrument payable to order can only be regularly transferred by the indorsement of the payee, which may be made by writing his name on the back of the paper, which is called a blank indorsement, or by making it payable to the order of another person, which is called a full indorsement. Paper payable to bearer may also be transferred by indorsement. The transfer of negotiable paper by mere delivery does not impose the same liabilities upon the transferor as does the negotiation by indorsement. The negotiation of paper payable to bearer by mere delivery warrants the title and that the instrument is legal and valid, that there is a sufficient consideration, that the signatures thereto are genuine

including any indorsements, where paper payable to order has been made payable to bearer by blank indorsement; while in addition, the transferrer by indorsement guarantees the solvency of the parties to the instrument and that it will be paid at maturity. The title to an instrument payable to order may be transferred by delivery but the assignee acquires no better title than if the instrument were non-negotiable. He takes it subject to any existing defenses.

Indorsement is the writing of one's name on negotiable paper with intent to transfer the title and to incur the liability of a party who warrants payment of the instrument provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser. The indorsement consists of the signature of the payee or prior indorsee usually written on the back of the paper for the purpose of making the transfer. The indorsement is not only the transfer of a negotiable instrument but it is also an independent contract and must be supported by a sufficient consideration. The term "indorsement" includes delivery which can only be completed by the acceptance of the indorsee, express or implied. The indorser guarantees that the paper will be honored by the prior parties; if it be a bill that has not been accepted, that it will be, on presentation and that the instrument will be paid at maturity. If the paper should not be honored by the original parties, the holder may proceed at once against them or against the prior indorsers after proper protest and notice of dishonor. The holder need not give any notice in order to fix the liability of the indorsers upon the implied warranties above mentioned except as to acceptance and payment but may bring suit against the indorsers immediately after the discovery of the breach

thereof. The indorsement "without recourse" relieves the indorser from liability for the dishonor of the paper but he nevertheless guarantees the genuineness of the signatures, the competency of the parties, the validity of the title and the legality of the consideration. He guarantees that it is the valid and subsisting obligation of the parties whose names appear upon the paper. Such an indorsement does not cast any suspicion upon the instrument or upon the financial responsibility of the parties. Indorsers guarantee the payment of the paper to all subsequent indorsees; and in case of non-payment each is liable in the order of the indorsements to every subsequent indorsee but not to prior indorsers. The indorsements are presumed to have been made in the order in which they appear on the instrument, but as between themselves and subsequent indorsees having notice, the order may be changed by special agreement, so that an indorsement may be treated as prior although it appears to be subsequent. In the absence of agreement express or implied, there is no liability for contribution among successive indorsers, even where the indorsements were made for accommodation. Where the paper is indorsed by the payee and a third person, the legal presumption is that the payee is the prior indorser, but this presumption may be overcome by parol evidence as between the parties. As between the immediate parties or those standing toward each other in the same relation, parol proof is competent to show what their obligations are. Kiel v. Choate, 92 Wis. 517. It is not essential, though important, that the indorsements should be written on the back of the instrument, but if not thus made it is subject to proof as to the intention of the parties. There may be a valid transfer of negotiable paper by a separate writing or by mere delivery but the assignee

would thereby acquire no better right than his assignor had against the original parties. If, however, the successive indorsements have completely covered the back of a negotiable instrument, a piece of paper may be attached and subsequent indorsements written thereon. Paper so attached is called an allonge, and is founded in convenience. Crosby v. Roub, 16 Wis. 616, 626. Where there are several successive indorsements in blank, the holder may fill out any of them and claim title through it, or he may fill them all up with the names of the successive indorsers showing regular indorsements in full from the payee to himself. In filling up blank indorsements the holder cannot increase the burden of the parties liable on the instrument, as by striking out the name of a prior indorser, or by making it payable in part to one person and in part to another. If the paper bears a blank indorsement, subsequent indorsements in full will not prevent its transfer by delivery.

The indorsement may be absolute or conditional. An absolute indorsement gives the indorsee the right to payment, and imposes upon the indorser the obligation to pay the face of the instrument at maturity in case the prior parties make default, subject to the requirement that there must be a seasonable presentment for payment and immediate notice to him of non-payment. The indorsement being an independent contract, is subject to such conditions as the parties may agree upon either precedent or subsequent, which may, or may not, destroy the negotiability of the paper. When a conditional indorsement prevents the further negotiation of the paper, it is called a restrictive indorsement, such as a direction to pay to A only, or to pay to A for collection. Negotiable paper may be transferred by delivery or by indorsement at any time after it is executed and

even after maturity, in which case the assignee takes it subject to existing defenses. The indorsement need not be dated as it is presumed to be made at the place where the paper bears date and before maturity, but this presumption may be rebutted by competent proof.

An irregular indorsement is one made by a person whose name does not appear upon the paper as payee or indorsee for the purpose of furnishing additional security. The courts are not agreed as to the liability of the irregular indorser, some holding that he should be treated as a joint maker, others as a guarantor, and others as an indorser without the right to notice of dishonor. The authorities upon the subject are collected and the conflicting views illustrated by the Supreme Court of Washington in the case of Banking Co. v. Savings Bank, 43 Pac. 359. The better and safer rule is to treat him as an indorser and to give him notice of dishonor. Blakeslee v. Hewitt, 76 Wis. 341.

A bona fide holder of negotiable paper is one who takes it in good faith, for a valuable consideration, in the usual course of business, before maturity and without notice of dishonor or of existing defenses. In his hands, the paper is not subject to defenses that do not appear upon its face unless they be such as to destroy absolutely the existence thereof as a monetary obligation. If the instrument was obtained by the payee without any consideration, or for a voidable consideration, or if the consideration has failed, or if it has been paid before maturity, or if after execution it has been put in circulation through fraud, theft or robbery, payment may still be enforced by an innocent holder for value. The only defenses that are available as against such holder are forgery, a material alteration of the paper, the incapacity of the maker, illegality of consideration

which renders the instrument absolutely void, or if it has been signed by the maker and put into circulation without his consent and without any negligence on his part. While a recovery may be had on a voidable instrument in the hands of a bona fide holder, the burden of proof may shift upon the trial from the maker to the holder of the paper. In an action on a note by an indorsee against the maker, where the defense is want or failure of consideration, the production of the paper by the holder and proof of the genuineness of the signature, if it has been denied, is sufficient to make out a case in his favor, and the burden is then upon the defendant to establish by competent evidence that the plaintiff is not a holder for value or to overcome any other element embraced in the definition of a good faith holder as already given. If, however, the defense is fraud or illegality of consideration, which would render the note voidable between the original parties, and which would naturally prompt the payee to transfer the paper, the plaintiff makes out a prima facie case by offering the note, and the defendant must then prove fraud or illegality; thereupon the burden shifts to the plaintiff to show that he took the note in good faith, for value and before maturity, or that he derived title from one who was a good faith holder; the burden then shifts and the defendant must show that the purchase was made by the plaintiff with notice of the defect or in bad faith implying wilful ignorance or guilty knowledge. King v. Doane, 139 U. S. 166; Holden v. Phoenix Rattan Co., 168 Mass. 570, 47 N. E. 241. Gross negligence may be evidence of bad faith but it is not the same thing; and the proper inquiry is, did the party seeking to enforce payment have knowledge at the time of the transfer, of the facts

and circumstances which impeach the title between the antecedent parties to the paper? Atlas National Bank v. Holm, 19 C. C. A. 94, 71 Fed. 489. If it appears affirmatively from all the evidence, whether produced by one side or the other, that the plaintiff is not a holder in good faith, there can be no recovery upon an instrument voidable for fraud or illegality. If the paper is absolutely void payment cannot be enforced under any circumstances.

Negotiable paper must be presented at maturity for payment to the payor or his agent at the proper place in order to preserve the right of action against parties secondarily liable, which include the indorsers and the drawer of the bill after acceptance. Guarantors and sureties are not discharged by failure to make presentment for payment or to give notice of dishonor. Their obligation is to pay the instrument at maturity if the maker does not, and this liability as regards the holder is primary and absolute. If there are joint obligors upon the paper living in different places and presentment cannot be made to all on the same day, it may be made to those who are accessible at the time and place of payment and to the others within a reasonable time thereafter. As long as the holder of the paper does not know where the payor resides, he satisfies the law if he holds it in readiness to receive payment at the place of the date. If presentment is made to the maker or acceptor in person and payment is refused without objection as to the place, that is sufficient, and protest may be made, if required, and notice of dishonor given to parties secondarily liable. Where days of grace are allowed, presentment must be made on the last day of grace, otherwise it is insufficient. If paper falls due on a legal holiday, presentment must be made on the suc-

ceeding business day unless days of grace are allowed, when if the last day be a holiday the demand of payment should be made on the next preceding business day.

The protest is intended to furnish the holder proof of the fact of presentment for payment and of notice of dishonor in an action upon the paper against the drawer and indorsers, and the certificate of a notary public is competent and sufficient for that purpose. The law merchant requires protest of foreign bills and notes only and, in the absence of statute, it is not necessary to protest inland paper, although it is not uncommon. Where a bill payable at a certain time in the future has been presented at maturity for acceptance and payment and dishonored, it should be protested both for non-acceptance and non-payment. Whenever negotiable paper is dishonored by non-acceptance or non-payment whether subject to protest or not, it is the duty of the holder to give immediate notice to all parties secondarily liable, otherwise they will be discharged. Such notice may be given by a notary and his certificate is proof of the fact. If the holder notifies all the indorsers, the notice will inure to the benefit of any one of them who may be compelled to pay the paper and he may then enforce payment against any prior party thereon. If the holder notifies only his immediate indorser, the latter should give immediate notice to prior indorsers for his own protection, and such notice will inure to the benefit of the holder and all others concerned. The notice may be given by the holder or by any person authorized to act for him and should be given, if the paper has been dishonored, in all cases and under all circumstances unless notice has been waived by parties secondarily liable. Immediate notice must be given, which includes the next day after dishonor. The notice

consists of the communication of the fact of dishonor and it may be in writing or it may be verbal; it may be given personally or may be communicated by telephone or by telegraph or by mail. No particular form of notice is required; it is sufficient if it contains a description of the paper and a statement that it has been presented for acceptance or payment, that it has been dishonored, that it has been protested, if protest is necessary, and that the holder looks to the party addressed for payment. Glicksman v. Early, 78 Wis. 223.

Delay in making presentment of negotiable paper is excused when caused by circumstances beyond the control of the holder and which are not imputable to his negligence. A general disturbance or overwhelming calamity which puts an end to usual business transactions and to commercial intercourse is sufficient to excuse the failure to make presentment and protest and to give notice of dishonor. Whenever the impediment is removed, it is the duty of the holder within a reasonable time to make presentment and protest and to give the notice. Presentment and notice may be waived by agreement between the parties, and are deemed waived when the paper is negotiated for the benefit of the drawers or indorsers, or when they have been provided with funds for payment, or where the drawer and drawee of a bill are the same person, or members of the same firm or officers of the same corporation, or as to one transferring the paper so near the date of maturity that it is impossible to make presentment. Presentment is also waived, where the parties secondarily liable, after maturity of the paper and with knowledge of the failure to demand payment and to give notice of dishonor, promise to pay the same or make part payment under

circumstances that raise a presumption of a promise to pay the balance.

Payment consists in tendering the amount due upon the paper for the purpose of discharging the obligation. If the intention is to purchase the paper the tender should be accompanied by a request for its transfer by delivery or indorsement. The presumption is that the tender of the amount is intended as payment, and it will extinguish the obligation unless there is an agreement to the contrary. Payment must be made to the holder of the paper or his agent upon the surrender thereof. If the instrument is payable to bearer or is indorsed in blank, it may properly be paid to any one having possession; but if payable to order, payment should be made to the last indorsee in order to discharge the obligation. Payment extinguishes the liability of the payor and subsequent parties to the paper; but if made by a party secondarily liable, it does not discharge the obligation of the prior parties and he may re-issue the instrument and transfer his right of action thereon as against them. When one indebted to another on two or more accounts or instruments, makes a voluntary payment of a sum insufficient to discharge them all, he has the right to direct how the payment shall be applied if such direction is given within a reasonable time; if the debtor fails to make the appropriation, the creditor may apply the payment as he pleases upon any debt that is due and the validity of which is not disputed; if no appropriation is made by either party, the law makes the application so as to carry out the probable intention of the parties, ordinarily to the indebtedness of longest standing or which is most burdensome to the debtor, except that the payment will be applied to a debt unsecured rather than to one secured upon the debtor's property.

If the security is given by an accommodation maker or indorser, the rule is different, and the application will be made so as to relieve him. Payment is usually made in money or its equivalent, but it may be made by a new note or bill signed by the same or a third party, and it will discharge the indebtedness when it is clear that such was the intention of the parties. Payment by note or bill is generally held to be conditional, but it suspends the right of action upon the original obligation until the new instrument matures.

Forgery is the counterfeit making or fraudulent alteration of any writing, which, if genuine, would apparently create a legal obligation. In its most common form, it is the signing of the name of another to an instrument with intent to defraud. The effect would be the same if an instrument were negotiated bearing a genuine signature but with a fraudulent representation that it was the obligation of another person of the same name. The material alteration of negotiable paper is a forgery, if done with intent to defraud, and not only avoids the instrument but also extinguishes the debt which constitutes the consideration. An alteration innocently made by a party to the paper, is not a forgery, but if material, will nevertheless destroy its validity although an action may be maintained for the original consideration. If the alteration is immaterial, the intent with which it is made is immaterial, and the instrument may be enforced. Fuller v. Green, 64 Wis. 159.

Any alteration, whether favorable or not to the party making it, is material, which in any manner changes the legal effect of the instrument with respect to the personality, number and relation of the parties or the date, amount or time of payment. If the alteration is apparent on the face of the paper it is incumbent upon the

holder to show that it was properly made, or at least was so made before he received it; if it is not so apparent, the burden is upon the party alleging the alteration to prove the fact. The existence of interlineations upon the paper raises no presumptions of a fraudulent alteration, provided the appearance of the writing and ink is such as to indicate that the whole was written at the same time by the same hand. Maldaner v. Smith, 102 Wis. 30. An alteration is not material which does not change the effect of the paper, as where words are put in or stricken out which have no legal significance, or are added which are implied by law.

The bona fide holder of negotiable paper which has been materially altered may enforce the same as against the parties thereto, if by their negligence they made it possible for such alteration to be made without leaving marks of suspicion, and for a prudent man to be thereby imposed upon. Anyone receiving or paying a forged instrument under the mistaken belief that it is genuine may recover back the amount paid therefor provided he promptly notifies the payee upon discovery of the forgery.

The surety and guarantor upon negotiable paper undertake to pay the face thereof on default of the principal debtor and in that respect the obligations are similar though founded upon contracts essentially different. A surety undertakes to pay if the debtor does not, while the guarantor undertakes to pay if the debtor cannot. A surety assumes his liability by becoming a regular party to the paper, as co-maker of a note, and his liability is then primary and absolute, and upon the failure of the principal to pay he is bound to respond without any previous demand upon the latter or notice of default. The guarantor is never a regular party to the

instrument, his liability is created by an independent collateral agreement by which he is bound for payment upon default of the principal debtor. The obligation of the guarantor may be written upon the same paper and it is then similar to that of the endorser, but it is different in this, the consideration should be expressed and the liability is not discharged by failure to make presentment for payment and to give notice of dishonor. The guarantor is bound to pay if he receives notice of the default of the principal within a reasonable time after the paper matures. The guaranty is not required to be in any particular form; it may be written on the paper or it may be a separate instrument. The guaranty may be absolute or it may be conditional, restricted to the happenings of some contingency, or limited with respect to the amount, or the time, or the number of transactions. When the guaranty is given contemporaneous with the execution of the original obligation, it is supported by the same considerations although an expression thereof is important, as "for value received." When the guaranty is subsequent to such execution it must be supported by a new and independent consideration acknowledgment of which should be therein expressed. Under the statute of frauds, a special promise to answer for the debt or default of another person is void unless the agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith. The liability of the surety being collateral to the principal contract and essentially a part of it, is not within this statute, while the obligation of the guarantor, being an independent collateral agreement, is within its provisions, and hence the necessity of expressing the consideration, especially if the undertaking is subsequent to the original

contract. A guaranty written upon negotiable paper passes with the transfer thereof and may be enforced by the holder, and if written upon a separate paper it is subject to assignment and in that way may pass to the holder of the original obligation and be enforced by him against the guarantor. If the guaranty relates to only one specific contemporaneous liability, or the negotiations are conducted personally, no formal acceptance is required especially if it is an express promise or undertaking; but where it is separate from the original obligation, especially if it relates to subsequent or continuing transactions, it is not complete until there has been an acceptance and the guarantor has been notified thereof. When the liability of the guarantor is dependent upon some condition expressed in the writing, a strict compliance is required in order to enforce the obligation. When the guaranty is absolute it is the duty of the guarantor to see that the debt is paid and he is not strictly entitled to notice of the default of his principal, and he is not discharged by failure to give such notice, unless he can show that by reason thereof he has suffered loss which he could have avoided if notice had been given within a reasonable time after the paper matured. The guaranty of collection stands upon a different footing from the guaranty of payment; it is an undertaking to pay on condition that the creditor shall first diligently prosecute the claim against the principal debtor without avail. As a general rule, a resort cannot be had to a guarantor of collection until the holder of the paper has recovered judgment thereon against the principal and an execution thereon has been returned unsatisfied.

It is the duty of the surety to see that the paper is paid at maturity, and it is his right to make payment

at that time, if the principal does not, and to seek indemnity from him and to enforce contribution from his co-sureties, if any; and any act on the part of the creditor which interferes with that right discharges the surety. A guarantor will be discharged by any act of the creditor which would discharge a surety. A valid agreement for the extension of the time of payment between the principals, or the surrender of collaterals given to secure payment of the debt will operate as a release of the surety in so far as it impairs his rights. If forbearance is granted by the creditor to the principal reserving the remedies of the surety he is not discharged, or if collaterals are surrendered he is released only to the extent of their value which measures his loss.

Because the surety has no interest in the contract of his principal, and because the creditor may prejudice the surety by delay without any specific agreement to that effect, equity will sometimes interfere in behalf of the surety, either against his principal or against his creditor. "In such a case the surety may proceed in a court of equity against the principal to compel him to pay the debt, or against the creditor to compel him to proceed at law to collect his debt from the principal." Harris v. Newell, 42 Wis. 687, 691.

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